

Potter Stewart Courthouse even though Plaintiffs' counsel already had deposed Mr. Brinker over two days, generating roughly 700 pages of transcript in April, 2000 -- a point in time much closer to the events giving rise to Plaintiffs' claims. At the time of the most recent deposition, Mr. Brinker was 86 years old and recovering from what may have been a mild stroke. As Magistrate Judge Hogan's prior Order indicates (doc. 295) and, as the transcript and the videotape of that deposition clearly attest, the conduct of that deposition by Plaintiffs' counsel was cumulative, antagonistic, and apparently designed more to confuse and harass Mr. Brinker than to elicit anything remotely relevant to the prosecution of this case. It was as if Plaintiffs and their counsel viewed the proceedings as a perverse sport. The questioning of Mr. Brinker frequently focused upon irrelevant, arcane details of a 1999 transaction which no 86 year old person reasonably could be expected to recall. It apparently was designed to confuse and upset Mr. Brinker and, unfortunately, it succeeded to a certain extent. Again, counsel urges the Court to review the transcript and the videotape of Mr. Brinker's most recent deposition to gain an full appreciation of what occurred that day.

III. THE ERRATA SHEET

Plaintiffs' motion is replete with familiar attacks on opposing counsel that are unworthy of any response other than a firm denial. Apparently, however, Plaintiffs now believe they are qualified to opine on Mr. Brinker's mental capacities. Such presumptuousness truly is amazing. The Provident and OHSL Defendants categorically deny that Mr. Brinker "is physically and/or mentally incapable" of recognizing inadvertent errors in his testimony and making changes to his deposition transcript. Indeed, this Court may consult with Magistrate Judge Hogan -- who had the opportunity to observe Mr. Brinker for more than two hours on February 5, 2004 -- if it needs an independent, objective lay observation of Mr. Brinker's mental capacities.

What Plaintiffs conspicuously fail to deny, however, is that Mr. Brinker indisputably made a couple of mistakes on facts about which no one disagrees. It is undisputed that the Provident/OHSL merger occurred in the fall of 1999 -- a little more than four years ago. (*See Consolidated Amended Complaint ("CAC")* (doc. 234) at ¶ 33). Thus, Mr. Brinker's testimony that he was unable to recall certain details because the merger was "17 years ago" obviously was an unintentional error which in no way affects the substance of his testimony. Similarly, there is no dispute in the record that Dinsmore & Shohl represented OHSL in the merger negotiations (CAC (doc. 234) at ¶ 26), and KMK represented Provident (CAC (doc. 234) at ¶ 29). Mr. Brinker's reference to KMK as counsel to OHSL in the merger was an obvious mistake which confused KMK's role as trial counsel at a latter point. There simply is no dispute that Mr. Brinker misspoke in these instances. Given the pressure and the personal hardship which Plaintiffs imposed on Mr. Brinker on the day of his deposition, seemingly by design, it is remarkable that there were not more errors.

Finally, counsel for the Provident and OHSL Defendants wish to debunk Plaintiffs' latest conspiracy theory about KMK. Mr. Brinker personally read his entire deposition. Defense counsel James Burke, who defended the February 5, 2004 deposition, met with Mr. Brinker, reviewed the erroneous statements made during his deposition and went over the changes reflected on the errata sheet. Counsel represents to this Court that Mr. Brinker realized his inadvertent errors (for which he was unnecessarily apologetic), understood and agreed with the corrections and knowingly signed the errata sheet. The claim of undue influence is silly.

IV. CONCLUSION

For all of the for egoing reasons, Plaintiffs' purported motion to strike should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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